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1/16/03

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

PHILIPS-VAN HEUSEN, CORP., :
Plaintiff :
:
v. : CIVIL ACTION NO. 1:CV-00-0665
MITSUI O.S.K. LINES LTD., :
et al., :
Defendants :

TRANSCRIPT OF PROCEEDINGS

ORAL ARGUMENT

BEFORE: HON. SYLVIA H. RAMBO, Judge

DATE: November 19, 2002

PLACE: Courtroom Number Three
Federal Building
Harrisburg, Pennsylvania

COUNSEL PRESENT:
PATRICK J. KEENAN, Esquire
For - Kellaway Intermodal & Distribution Systems, Inc.

ANN-MICHELE G. HIGGINS, Esquire
CHARLES MCCAMMON, Esquire
For - Mitsui O.S.K. Lines, Limited

RICHARD WHELAN, Esquire
WILLIAM ECENBARGER, Esquire
For - DAMPSKIBSSELSKABET AF 1912

Vicki L. Fox, RMR
Official Reporter

THE COURT: Good morning, everyone. I have a question I need to have answered. I have a lot of questions that need to be answered. Is Kellaway responsible for attorney's fees in Van Heusen's contract claim against Maersk and Mitsui?

MR. KEENAN: The answer is no, Your Honor.

THE COURT: Is Kellaway responsible under the UIIA for indemnity for attorney's fees?

MR. KEENAN: Again, Your Honor, the answer would be no.

THE COURT: Why? What is the difference?

MR. KEENAN: You are talking about the third party claims by Maersk and Mitsui?

THE COURT: Correct. Let's start with Van Heusen against Maersk and then Mitsui on the contract action.

MR. KEENAN: Your Honor, first of all, as it is set forth in the brief with respect to the contract action, the liability of the third party plaintiffs was based upon contract.

They are liable to PVH -- basically strictly liable by virtue of the fact they did not deliver the containers. The liability that was imposed upon Kellaway was based upon bailment principles and negligence.

It is clear as it was set forth in the brief, Your Honor, that the law does not provide for indemnity in

contract actions. The only indemnity is when it is based upon principles of negligence.

And the liability that the third party plaintiffs had to PVH that Your Honor found was based upon contract principles. They entered a contract with PVH that Kellaway was not a party to. The liability that they had under that contract was to -- as Your Honor ruled was to reimburse PVH for the cost of the containers.

The claim that PVH had against Kellaway was a separate legal principle which is a principle of bailment and negligence. So because there was no finding of negligence against the third party plaintiffs, there should not be any flow of indemnity that would go from Kellaway to the third party plaintiffs because they are different theories.

Why that is a reasonable premise, Your Honor is because to find otherwise would basically turn Kellaway from being a defendant whose liability had to be based upon principles of negligence into a party that would be strictly liable under a contract that they were not a party to, nor were they privy to.

That would pretty much turn Kellaway's responsibility on its head. It would all of a sudden change their position from being one that just had to use reasonable care to one that would be a guarantor. When in fact the only one that ever agreed to be a guarantor were the third party

plaintiffs to PVH.

It would be very unfair to require Kellaway to indemnify them for attorney's fees for defending a contract claim that they weren't a party to, Your Honor.

Now under indemnity principles, of course, since ultimately Your Honor found Kellaway was responsible, they would be liable for the actual monetary damages, but not attorney's fees.

THE COURT: Why?

MR. KEENAN: As I said before, Your Honor, because under the law, the duty for someone to indemnify for attorney's fees does not flow when the liability of the person seeking indemnity is based upon a breach of contract.

And we cited in our brief, Your Honor, a series of cases including the Theyssen, Inc. V. S/S Eurounity, 21 F.3d 533.

THE COURT: What page are you reading?

MR. KEENAN: It is page three, Your Honor.

THE COURT: What was the name again?

MR. KEENAN: There are several cases, Your Honor. One is the Theyssen case. The other case is M/V OOCL Bravery which quotes from the Leather Best case which is a Second Circuit case which is at 451 F.2d 800.

And also, Your Honor, if I could just read from the brief. An agreement to indemnify another for his

contractual liability to a third party will not be inferred and must be stated expressly, clearly and unequivocally in an indemnity clause.

It says indeed because the nature and purpose of any indemnity agreement involves a shifting and voluntary assumption of legal obligations, they are to be narrowly construed. As a general rule, parties must use clear, unambiguous language to insure their enforcement.

Under the UIIA, the only liability that Kellaway agreed to under the indemnity provision was for negligence. The liability that the third party plaintiffs had to PVH was not based upon principles of negligence. It was based upon principles of contract, Your Honor.

Again, the importance is that if Kellaway ultimately is found to be required to indemnify them for attorney's fees, it essentially places Kellaway from one that would be responsible under the principles of negligence into a party that would be responsible for basically strict liability under a contract that they weren't a party to, Your Honor.

Basically, that would be extremely unfair to any bailee in a situation where they have not entered into a contract with the person that was the shipper.

THE COURT: Can I have a response?

MS. HIGGINS: Yes, Your Honor, Ann-Michele Higgins on behalf of Mitsui. Your Honor, I would state first that this was not a matter of a strict liability contract. As the bill of lading indicates, the goods loaded in the container and then not delivered would be a prima facie case of liability, and then the burden shifts to the defendants to rebut that liability.

The Court noted in your opinion at page 19 that in fact the defendants have rebutted that burden, and therefore under the liability scheme, a negligence standard had to be established.

So in fact, it was negligence that there was a finding of liability on the carriers. And I would concede then if Mr. Keenan suggests that Kellaway would be responsible for negligence, that they would under those circumstances because there was a finding of negligence that this Court found against the carriers. And then we in turn had the third party agreement with Kellaway.

So it is not a strictly liable argument, but rather it was one based on negligence.

THE COURT: Mr. Whelan?

MR. WHELAN: Your Honor, what I think Kellaway is attempting to do here is to reargue liability which has already been decided by the Court.

The liability as the Court noted, as Ms. Higgins

mentioned, on page 19 is based upon the negligence of the motor carrier Kellaway. And due to the finding of negligence, it falls squarely within the language of the indemnity clause that is contained in the UIIA agreement.

There is no strict liability. There is no absolute liability under the contract claim. It boiled down to a finding of negligence.

I also disagree with Kellaway's argument concerning the clause itself. It is very clear. It does not say liability based upon negligence in the indemnity clause. The language is arising out of the motor carrier's negligence.

It is simply -- if negligence is involved by the motor carrier and liability arises out of that negligence, be it contract or otherwise, the indemnity clause would come into effect and would require Kellaway to fully indemnify Maersk as a part of the UIIA agreement.

So it is a two-fold argument. A, that the whole decision -- Your Honor's decision was based on Kellaway's negligence, not strict liability.

Secondly, the clause is not ambiguous. It is very clear arising out of the motor carrier's negligence, and clearly with Your Honor's findings clearly falls within that clear language of the agreement.

THE COURT: So you two don't see any difference between PVH's claim against Maersk and Mitsui's and then Mitsui's claim against Kellaway for indemnification? You don't see any difference?

MS. HIGGINS: That's correct, Your Honor. I don't.

MR. WHELAN: Your Honor, I think what it boils down to is if you go back to the original claim by PVH, it arises out of a contract, as does the liability. The contractual contract between THE UIIA agreement was the contract between Kellaway and Maersk.

And just because the beginnings of the -- or the relationship which causes the lawsuit involves a contract, I don't think that then require there to be only contractual liability between the parties.

Getting back to that, clearly as we said at the trial, in order for us to be liable to the plaintiffs, Kellaway has to be proved to have been negligent and therefore we are a pass-through. That is Maersk's position on it.

Under the terms of -- under the plaintiff's liability case against us, it would necessarily fail if Kellaway was not found to have been negligent. So if the plaintiff's loss on that point could not prove the negligence of Kellaway, then Maersk and Kellaway would both not be

liable.

THE COURT: Do you want to respond?

MR. KEENAN: Yes, Your Honor. There is a difference between a duty to defend someone versus being ultimately responsible for a loss. Under the law if the loss is ultimately determined by one party, that party should bear the expense of compensating the person suffering the monetary loss.

The issue here is whether or not Kellaway had a duty to defend the third party plaintiffs against the claims of PVH, which is separate and distinct. Again, the importance here is that the liability of the third party plaintiffs was based upon contract.

They may want to say you take the contract, and there are certain burdens that shift under the contract. But basically, it's a contract. There was a bill of lading that was issued by third party plaintiffs to PVH that Kellaway was not privy to, was not a party to.

And the law makes clear that -- and I will just reading this section from my brief on page three -- that Kellaway was -- quote -- not liable ex contractu for the breach of the contract between the disclosed principal and a third party even when the breach was a result of its own wrongful act.

So the law recognizes the distinction between the liability of the third party plaintiffs to PVH which is based upon contract. It is based upon the bill of lading. That is why they were held responsible, Your Honor, because they took the position that they did nothing wrong. They physically didn't have possession of the containers when they were lost.

But Your Honor found under the law that they breached the contract with the bill of lading which required them to return the containers to PVH. Because they didn't deliver it, they contractually breached the bill of lading.

Now the liability on the part of Kellaway is quite distinct. It's based upon common laws of negligence because of a bailment. That is quite different than the contractual duty that was assumed by PVH.

It is clear that when you have two different theories of liability -- one being negligence against Kellaway, the other being contract on PVH -- that the person claimed to be negligent doesn't have a duty to defend the third party plaintiff in this instance.

If it were, Your Honor, it would all of a sudden elevate Kellaway from a person in a bailment position that has all of the defenses in the common law negligence principles to one that would have had the liability that was assumed by the third party plaintiffs under their contract.

It would elevate their liability to being strictly liable for the loss as the third party plaintiffs were.

That is incoherent with the general principle that just as a negligent party, they are just responsible for indemnifying the person who suffered the loss for their loss, but they are not required to indemnify the third party defendant for their cost to defend the case because they don't have a duty to defend the case.

Again, Your Honor, if it were held that Kellaway had to defend the third party plaintiffs, Kellaway basically would not have had any of the defenses such as assumption of risk, contributory negligence, all of the defenses it had in a bailment situation, because all of a sudden, it would have to step in the shoes of the third party plaintiffs contract, which they don't have those defenses. So that would be certainly unfair. It is not recognized by the law to do that, Your Honor.

THE COURT: Any response?

MR. WHELAN: Your Honor, I think, again, we are confusing the terms of the UIIA agreement which does not indicate -- is not limited to a situation where there is only a negligence case involved, where you are proving a tort of negligence and basing liability on that. It only speaks in terms -- and I can quote --

THE COURT: Where are you reading from?

MR. WHELAN: This was under the indemnity section of the UIIA.

THE COURT: What are you reading from so I can follow you?

MR. WHELAN: If Your Honor could turn to our original -- it's Maersk Line Exhibit T. Would you like me to refer you to a part of my brief? Would that be easier?

THE COURT: Yes, that would be easier. Although I do have -- I don't have Exhibit T.

MR. WHELAN: It would be on page two of Maersk Lines Petition for an Award of Attorney's Fees and Expenses with Supporting Memorandum of Law.

THE COURT: Hold on.

MR. WHELAN: It has two large exhibits attached to it.

THE COURT: I have page two.

MR. WHELAN: Okay. Down at the bottom, there is a quote of the indemnity section which is contained in Maersk Exhibit T, which is a UIIA amendment.

It reads Indemnity: Motor carrier -- and I have in brackets Kellaway Transportation, Inc. -- agrees to defend, hold harmless, and fully indemnify Provider Maersk Line -- in brackets -- an equipment loaner and/or facility operator as their interests appear against any and all loss, damage or liability including reasonable attorney's fees and

costs incurred in the enforcement of this agreement suffered by provider, equipment owner and/or facility operator arising out of motor carrier's negligent or intentional acts or omissions during an interchange period and/or presence on facility operator's premises.

And the language refers to negligent or intentional acts or omissions, and arising out of those particular acts. It doesn't indicate that the case has to be based only upon negligence, or that a contract cannot be involved.

In fact, it is evident from the UIIA that all of these relationships are contractual, that being the relationship between the shipper of the cargo and the ocean carrier. And then there is a contract between the ocean carrier and the trucker. And it would be basically rendering the whole UIIA agreement meaningless if it would not include negligence -- the negligent conduct of Kellaway as it is involved in this sort of group of contractual relationships that it necessarily exists when you are moving cargo from point A to point B.

So I think that another point --

THE COURT: Well, it does say arising out of motor carrier's negligent or intentional acts or omission.

MR. WHELAN: Which is exactly what Your Honor found in your opinion.

THE COURT: Right.

MR. WHELAN: That Kellaway was negligent.

THE COURT: I agree.

MR. WHELAN: And that was a negligent act or omission. So this whole case is arising out of necessarily based upon the decision already rendered, the negligent acts of Kellaway. And that triggers the indemnity provision which allows Maersk and Mitsui to recover all the attorney's fees incurred. It also triggers the full defense and hold harmless portion of the indemnity agreement.

I would also add that even assuming as Your Honor has already held in a footnote in your opinion that even if the UIIA would not apply, that there still would be full indemnity under Pennsylvania bailment law which is footnote 10 on page 29 of Your Honor's decision.

And as we briefed in our various briefs -- unfortunately, I don't have the section available now. But under Pennsylvania law, you certainly when you get indemnity under the bailment law as Your Honor pointed out in footnote 10 on page 29, necessarily you would get defense costs and attorney's fees as part of the full indemnity even under the Pennsylvania negligence law.

So under either scenario, the ocean carriers are entitled to full indemnity for counsel fees and expenses for defending the plaintiff's case. And then there also is --

maybe Your Honor will get to later -- a specific provision in the indemnity clause about costs incurred in enforcing the agreement itself.

THE COURT: Now there have been some --

MR. KEENAN: May I briefly respond to that, Your Honor?

THE COURT: Very briefly.

MR. KEENAN: Thank you, Your Honor. Your Honor, I would submit to you that this provision in the UIIA actually supports Kellaway's position.

First of all, as the parties seeking to enforce a provision, it is to be strictly construed against the third party plaintiffs. In order to enforce it, the language has to be clear and unequivocal.

If this was intended to require Kellaway to indemnify the third party plaintiffs for their contractual duties to a party that Kellaway was not privy to, it should have stated that. It should have said that Kellaway was agreeing to indemnify and hold them harmless for breach of contract actions. It doesn't say this.

What it says is that we will indemnify them for tort actions, a tort action which is based upon Kellaway's negligence. For example, if Kellaway had the container on the back of their truck and was driving down the highway and caused a motor vehicle accident, clearly this would apply

with that situation because any claim against PVH would be on tort principles for which Kellaway would assume an obligation to defend and indemnify them.

That makes sense because that would not change the liability characteristics of Kellaway. Kellaway's liability would have been negligence. The claims against the third party plaintiffs would have been negligence merely because Kellaway is acting as her agent, and they would be sued as a principal.

However, this is quite different because they are being sued under contract. There is nothing in this indemnity provision that references a contract liability of the third party plaintiffs.

I stress that the importance of this is that if Kellaway is required to defend them, it all of a sudden elevates their duty of being one of common law negligence to contractual liability under a contract that they never signed or never even saw.

To read this as saying clearly and unequivocally it requires that they would have to take the next step and say that all of a sudden Kellaway is agreeing to be bound by any contract the third party plaintiffs should ever enter into with any other party that Kellaway will be blind to, will not know what type of obligations they are assuming to defend.

However if you read it the way I suggest it should be read, which is the reasonable reading, there's no problem with it if it is based upon tort theories. Because the tort theories are just based upon common law.

Kellaway understands what duties it is assuming under the common law, under negligence. It has no idea what duties is trying to be imposed upon it by the third party plaintiffs under a contract theory.

And I would stress, Your Honor, that if they intended to make Kellaway obligated to defend and indemnify them from contract claims, it should have specifically and expressly and unequivocally stated that in this indemnity provision. It is absent.

The only words in there are negligence. That comports with tort principles. So if there is a tort claim against the third party plaintiffs and they join Kellaway because ultimately Kellaway was responsible for the tort, and they are being sued vicariously, then Kellaway should step up and defend them under the agreement.

That is not what happened here. There were sued under contract principles, Your Honor, not tort principles. So under the UIIA, they had no duty to defend and indemnify.

MR. WHELAN: Your Honor, if I may briefly respond to that. I think there is language in the agreement that completely takes care of this issue. It is what I read

earlier after the words as their interests appear against any and all loss, damage or liability.

Any and all liability clearly means every type of liability -- contractual, tort, strict liability, whatever it may be. It is any and all liability.

Kellaway bargained for this agreement, signed it. And any and all includes contracts, tort and whatever type of liability that is involved in the case.

And to say that Kellaway didn't have a chance to look at the contract or it was unfair, the fairness here is Kellaway was the sole entity that had possession of the equipment involved in the case. It makes sense that they then added, or softened the language, rather than having absolute indemnity limiting to liability arising out of that -- that is any and all liability arising out of the negligent acts, omissions or intentional conduct of Kellaway.

So there is a qualifying word to that. But the liability part, whether it is contract, tort or any other theory, is handled by any and all liability, any and all loss, damage or liability. Then the subsequent words are qualifying words to that language. And that necessarily would have to include contract claims, tort claims and any other claims that the parties could be involved in to which the UIIA would become involved.

MS. HIGGINS: And just simply, Your Honor, the liability in this case was founded on the negligence of Kellaway. This Court held but for their negligence, we would not have had the breach of contract under the bill of lading.

Again, it was negligence principles that applied in determining the initial liability.

MR. KEENAN: Your Honor, just two quick things. One, Your Honor did not find that their liability was based upon negligence. You found separately that their liability was found upon breach of contract because they didn't deliver the containers which was separate and apart from any claims of Kellaway.

Kellaway could not have even been in the case, and they would have still been found liable for breach of contract. And that is what Your Honor found.

The suggestion somehow that Kellaway softened the language is a little bit absurd as was testified to by Mr. McLaughlin who was the CEO of Kellaway. This is really a contract of adhesions, a take it or leave it as prepared by those who have the power in the industry, which is the ocean carriers, not the trucking companies.

Basically if you want to be in this industry, you have to sign off on this agreement. And certainly, Kellaway had no input in this language. The input was created by the

third party plaintiffs.

If they wanted their contractual liability to be indemnified and defended, they should have expressly stated that. Instead, it talks in terms of negligence, arising out of the negligence of Kellaway and other trucking firms, Your Honor. That is not clear, and that is not unequivocal language. And therefore, it should not be enforced against Kellaway.

THE COURT: Let's take a look at the objections to the billing. This was in a document in the form of a letter. And attached to it were some objections to the unreasonableness of the fees sought.

There is a footnote one on the first page. In many instances, multiple activities were jointly billed as one entry on an invoice. Since counsel for Maersk and/or Mitsui did not break down the time in a more detailed fashion, Kellaway is unable to do so.

What am I to do with that?

MR. KEENAN: Your Honor, I think because the burden is upon the third party plaintiffs to prove the reasonableness of their attorney fees, I think it was their burden to break down those entries. Since they didn't, that is to be construed against them, Your Honor.

THE COURT: Are you referring to the entries that are listed under 1(a), or are these entries that --

MR. KEENAN: Basically if you look at their actual bills, block billing, they will have a paragraph they will name multiple tasks for one day and just have one number. It will say wrote letters, spoke to so and so, did this, did that. As opposed to having a breakdown of each of those tasks, they just have one unit number for that entire block.

So we can't say how much they spent that day doing a particular task. So I think that in fairness because it is their burden to prove the reasonableness of their attorney fees, it can be assumed that that number applied to the tasks that we identify in our letter, Your Honor.

THE COURT: Do you want to respond to that one?

MR. WHELAN: Well, Your Honor, at least from Maersk's perspective, the policy of our firm is, and the policy of this client that we bill to, is to allow block billing.

In the long run, we have found some clients prefer that to avoid being charged a minimum amount for a 30 second phone call, for example. The block billing allows multiple tasks to be put in and could result in client savings. That is the reason why it is done. This is the procedure of our firm.

THE COURT: It may be the procedure of your firm, but I have the responsibility of determining whether the work done was reasonable and necessary. How can I decide that?

MR. WHELAN: Your Honor, I think that the billing that I produced with my memorandum as an exhibit is detailed billing with specific numbers. There are some block billing examples. However, I think Your Honor can look at the tasks involved and determine whether it is a reasonable amount for the tasks involved even if it is block billing.

If there is a phone call included with the preparation of a research memorandum which is included with another telephone call, I think someone can look at that and determine whether it is a reasonable amount or it is not a reasonable amount.

I think it is no different than looking at an individual entry for a telephone call or an individual entry for the preparation of a legal memorandum. It involves a little bit of subjective analysis.

THE COURT: On page two, there is an objection concerning the time spent for the liability expert. Even if the liability expert is not called for trial, if the liability expert in some way assisted in the defense of a trial or the prosecution of the trial, wouldn't counsel still be entitled to that cost?

MR. KEENAN: Certainly a reasonable amount, Your Honor. But this is like ten hours just to locate and have preliminary discussions with the expert. I believe that is unreasonable, Your Honor, particularly in light of the fact

that the expert was never even used.

THE COURT: Response, please.

MR. WHELAN: Your Honor, I have gone through the time entries that were specified there. Kellaway in their letter submission indicates that 10.2 hours having preliminary discussions with the liability expert was excessive.

I've gone through the individual entries. The July 30 entry, which is 2.3 hours, was not just for discussions with the cargo security expert. It also included drafting discovery requests. The same would be true for the entry of July 31st which includes the drafting of discovery requests. And the entry for August 1st -- again, this is all supported by my actual bills attached as an exhibit in the descriptions.

August 1st includes various phone calls on other matters involving the case. And the August 2nd telephone call was a call from myself to the client for .2 hours concerning the expert, what he has said, how to use him, how he can assist in the case. And the final amount on August 3rd, 2001 is 2.2 hours. This was part of getting the package of documents and other materials together, reviewing it and sending it out to the expert.

The liability expert -- engaging of a liability expert, deciding whether one will be called as a witness at

trial is a matter of litigation strategy. As Your Honor pointed out, parties can often engage experts to provide them advice and consult with the attorneys without testifying at trial.

This expert Mr. DeBellis was present at trial. I made a litigation strategy decision not to call him. He was here on the last day of trial. I made that decision not to call him. He did prepare a report which was produced and attached to the pretrial order.

I submit that it is entirely reasonable to recover 10.2 hours that are associated with the expert engaging -- searching for an expert, engaging Mr. DeBellis and using him to consult during this matter.

THE COURT: On the same page two, go up to the complaint set forth in paragraph B, complaint against the JEV Company.

MR. WHELAN: Yes, Your Honor. This is basically at the outset -- or close to the outset of the case, Kellaway produced a lease that indicated that JVE, Incorporated was the owner and operator of this premises.

The suggestion was made that they might be or are or were responsible for the security of the facility. In order to comply with a scheduling order that required the joinder of third party defendants by July 5th, 2001, we prepared the third party complaint on July 4th and 5th, 2001,

served it -- filed it and served it on July 5th within the deadline.

We ended up taking -- noticing Maersk, ended up noticing and taking the deposition of the President of that company William Smith, which took place here in Harrisburg. It was determined that the company was now basically defunct and without insurance and without assets.

And eventually, Kellaway acknowledged as the case went forward that they were the ones in fact responsible for the security on the premises, and therefore JVE was dismissed from the case.

The 4.7 hours which this adds up to it is our view is reasonable under the circumstances for preparing, revising and filing the third party complaint against JVE. It did result in the taking of testimony that was helpful to the defense of Maersk in this case.

THE COURT: Page three, H, 32 hours to prepare pretrial memo, findings of fact, conclusions of law and exhibit list, 32 hours.

There is a notation that this was longer than the actual trial. I am familiar with our pretrial memorandum. The only thing I can conclude is that the majority of those hours were findings of fact and conclusions of law.

MR. WHELAN: Your Honor, I have gone through the entries for December 19, 20 and 21st. That involved the

initial Court order process for the parties to exchange exhibits and try to reach an agreement on stipulated facts.

During that time period if Your Honor looks at the exhibit bills that also have additional entries in and around those time periods, there were meetings with counsel involved in the case to try to get agreements on these items. That time was spent reviewing the various exhibits of other parties and drafting our own exhibit list and making decisions on exhibits and disclosing them and serving them.

Those are the entries for that time period. The January 2nd entry involved drafting conclusions of law and then attending a telephone conference, which again was part of the process with the other attorneys in the case trying to reach an agreement on pretrial submissions.

There is another entry on the 2nd of January 2002 which involved the reviewing of the file for preparing the pretrial order and memorandum and conducting limited research. That was by me. It included both work on the pretrial order and research on the new claims -- the new claim submitted by the plaintiffs in this case for the additional profits which was being hotly contested at the time and then was contested at trial.

The entries starting on January 1st through January -- I'm sorry -- January 3rd through January 4th, this was work done for the pretrial submissions required by Your

Honor's order which included the pretrial order, the exhibit list, proposed findings of fact and proposed conclusions of law.

It is our position that what we submitted was very comprehensive. It required a lot of time. It required additional double checking on research and things like that.

It constituted a significant amount of attorney time to get these filings ready, and it is our position that they were charges -- the charges are reasonable and necessary to comply with the Court's order.

THE COURT: Page five, L and O, 3.75 hours for investigation Kellaway corporate identity.

MS. HIGGINS: Yes, Your Honor, I can speak to that since it deals with Mitsui. Originally in the litigation, there had been a stipulation that was proposed -- and frankly, I am not quite sure who did it -- but there was a certain issue and the Maersk complaint listed various Kellaway entities, and the Mitsui complaint had only listed one Kellaway entity.

When the matters were merged, there were some issues as to whether those claims would still be bound in a joint litigation. My understanding is that the stipulation had been drafted and signed by some of the parties and not all of them. And my investigation was to see whether or not that would prejudice us at trial if we had only the one

Kellaway entity in the matter, and if that would prejudice us if they argued a separate theory or a separate company would be liable for the actions.

So in my mind, it was a significant finding to the third party liability claim.

THE COURT: O, under that, the 3.2 hours for a phone call and reviewing Court filings.

MS. HIGGINS: This was also in the same time frame that Mr. Whelan spoke of I think dealing with the phone call. It was when the parties were trying to get together with the joint stipulations and the preparation. It was not a five minute phone call.

But in addition, in an attempt to reach the stipulation, we went through the various Court filings including the request for admission that the parties had prepared to see what items could be agreed to with joint stipulation and which ones were contested.

Frankly, many items were contested which resulted in some extra preparation on our part.

THE COURT: On that same page, I and J, 3.2 hours for reviewing correspondence, 2.3 hours for reviewing a letter and updated discovery document.

MS. HIGGINS: The mostly correspondence relates specifically for correspondence from Maersk'S counsel which had included answers to requests for admissions and

correspondence was drafted to the client related to that.

Additionally, there were Customs Service issues that were still outstanding, and a reminder notice and correspondence was sent to an outstanding Freedom of Information request. Your Honor will recall that later on in December, we did have a motion to compel filed related to some of the Customs issues. That was an item that we were dealing with in October as well.

There was also a review conducted of objections to discovery responses to determine whether to withdraw the objections or answers to the interrogatories that had been objected to. So that was a review of the pleadings in that area.

And as for -- did you say J?

THE COURT: Yes.

MS. HIGGINS: That also included the entry for J related to discovery items and Customs issues there.

THE COURT: Go to page six. There are two issues raised in that. There are a number of objections to the fact that Mitsui billed a certain number of hours for attending conferences, and Maersk was about half the number of hours for attending the same thing.

Is there an explanation for that difference?

MS. HIGGINS: I think there is, Your Honor. In speaking with Mr. Whelan, I believe he mentioned on the one

conference, his travel time may have been billed separately.

I know that for my purposes, in the travel time out here sometimes it was two hours out here minimum and two hours back. So for an eight hour trial, that is how we wound up with twelve hours.

There was also a deposition where some extra time was spent. Frankly, it was in North Jersey. We were starting in the morning, and I really did not want to be late for the deposition or for any of the Court conferences. So if I did leave early, I would have just spent the time maybe if there was an extra half hour reviewing notes or making phone calls or something like that.

THE COURT: The differences you are indicating primarily were the result of travel time?

MS. HIGGINS: I think so. In terms of the twelve hours, I would say that it was eight hours for the trial and then two hours each way driving. In fact, frankly this morning, I left more than two hours early because I anticipated some traffic concerns.

THE COURT: The paragraph right above Q on page six, there's some objections concerning potential problem of double billing.

MS. HIGGINS: That is always a concern, Your Honor, when more than one attorney works on a case. In fact, it is not double billing. What I might do is segregate the

issues in the findings of fact and conclusions of law. Say I would handle bailment and then would give an assignment to Mr. McCammon to deal with another area of it.

While I would review his work, I would not necessarily bill the client for that. I did mention in my brief any time in reviewing the bills before these are sent out to a client, I have the billing partner review them for what I feel is the first level of reasonableness.

And in this case, I did write off several thousand dollars worth of time that would have been time that Mr. McCammon or myself might have spent on the file that I did not think was reasonable.

I think in the overall looking at it as an entire action, that's certainly one factor that I would argue is that as the billing partner, the first level of reasonableness is what I feel was reasonable doing the work. And in that case, I did feel some of our work was excessive, and the client was not billed for that.

And obviously, then Mr. Keenan's client would not be billed for that either on the indemnity action.

There are a couple of other issues, if I could, just in general with reasonableness. I think, first, we tried very hard to reach stipulations, but we weren't always successful in them.

But frankly, in a maritime case, you always have a

concern of overseas traveling, try and reach --

THE COURT: Excuse me.

MS. HIGGINS: We try and avoid expenses and costs where appropriate. For example, if you recall, at the very last moment there was an exhibit. I think it was Plaintiff Exhibit 103, which was an affidavit from the Indonesian packer of the goods.

Generally, that is something that we may have had to travel for. We try and view these cases to keep the costs manageable, and we were able to do it by stipulation in that case.

One of the depositions in the case of a witness that came up towards the end was a telephone deposition instead of going up there again in an effort to try and keep the cost manageable and still complete matters in the same time frame.

I would suggest also that frankly, Mr. Whelan's firm and my firm practice a lot of maritime cases. And the bills for the two firms did seem comparable which I think would be a factor that the Court would consider in the reasonableness standard.

The Third Circuit spoke to that in the Ming Moon case. And in fact, that was a maritime case. And the total claim for that case was $227,000.00. It was over a five hundred dollar package limitation. The Court said there you

don't look to what the eventual liability is. You look to what the total claim is.

So in this case, there were two Mitsui containers. That was almost $300,000.00 worth of damages. Not all of that was awarded at trial. So I think our efforts were very reasonable, first of all, in defending the claim on the damages portion of it and then presenting the defenses thereafter.

And in fact in the Ming Moon case, the attorney's fees were $61,000.00. The Third Circuit held that is reasonable under the circumstances. That was ten years ago. Our fees for this case for a larger amount $300,000.00 were I believe in the range of $66,000.00. And that included costs of some deposition transcripts as well.

So I would argue that that is a reasonableness standard that should be considered as well.

THE COURT: Mr. Keenan?

MR. KEENAN: Thank you, Your Honor. Let me preface my remarks because I do have utmost respect for my colleagues, but still under the circumstances, there is billing that is excessive for the type of case here.

There can be times where good counsel can be overly aggressive and overbill a file. I think there were instances of that here.

Just, for example, this was a relatively short trial. We had the pretrial memorandum exceeding the length of the trial in the case of Mitsui. It was double the length of the trial. I think it was 56 hours for their pretrial memo; whereas it was 32 for Maersk.

Also, it is their burden to prove the reasonableness of their fees. And to say that I think the excess billing was caused because of driving, that really doesn't meet their burden. They have to prove that that is what the difference is.

There's other examples, Your Honor. There is like three hours for summarizing a deposition that took six hours. I mean these are things that are really not billing that comports with the type of case we had here.

This was not a complex case. This was a theft of two containers from a container yard. This wasn't real tricky stuff.

And there is also even -- the other thing you have to look at, Your Honor, is they do practice in this area. They are expert in this area. And to have the type of billing they have, for example, for legal research cannot be justified.

I mean these were basic bailment issues and basic issues under the bill of lading and contract principles that was not worthy of the type of legal research that was shown

in their bills. Of course, I give them their due, and that they are expert in this area. That also goes with they shouldn't have the type of billing that they had here because it comports with their higher hourly rate that they are justified in getting. We haven't argued that they weren't entitled to the rate that they are charging.

THE COURT: Mr. Keenan, if you have a six hour deposition and you are going to go through it page by page and take notes as to certain areas in the deposition that might be potential for use on cross-examination, and you do it, and it takes a third of the actual deposition time, you feel that is excessive for that kind --

MR. KEENAN: I think so. It's a six hour deposition. It is normal in the defense practice when you come back from a deposition, you immediately do a deposition summary. It's not based upon the transcript because you don't have the transcript yet. You wouldn't have that for several weeks. It is based upon your notes.

I can say since I have done hundreds of them that basically, all you are doing is you are reading the notes you took at the deposition. It really should never take -- you are not reading anything. You are just reading your notes and giving a summary so your client can get a report on basically the gist of what the person testified to, the important parts of his testimony.

And that is what this billing is for. This billing was for deposition summaries that would be different than a line by line summary which would be part of the trial preparation. Obviously, that takes more time because you are reading through the transcript, and you are making designations by page and line that you can then use for trial for the purposes of cross-examination.

These entries aren't for that. These are deposition summaries which don't to take half the length of the deposition to do. At least, that's my experience, Your Honor.

Also with respect to -- for example, the joinder complaint of JVE which was the landlord, and Kellaway never took the position in the case that they didn't possess that property and weren't responsible for the security there.

There was no reasonable need to join JVE, which I think was ultimately proven by the fact that they were voluntarily dismissed. I think that was just being overly aggressive and not warranted by the case or the evidence.

I don't think that that should be part of the attorney's fees claimed, Your Honor.

MS. HIGGINS: It was a Mitsui entry, Your Honor, on the drafting the deposition summary. Frankly, I should clarify that.

We will generally not have an attorney do that

line and page summary that he would. That would be a task in our firm that would be more suited to a paralegal who would charge it out at a lower rate.

In fact, the full entry for that day which is September 12, 2001 --

THE COURT: What page are you on?

MS. HIGGINS: It is Exhibit --

THE COURT: I am looking at the letter.

MS. HIGGINS: Forgive me, Your Honor. It would be --

THE COURT: Page four, excessive billing by Mitsui, II, Subsection A?

MS. HIGGINS: Page five, letter F.

THE COURT: Okay.

MS. HIGGINS: The entry is revising a summary of the deposition. However, the time entry actually reads: There was an additional drafting of a status report to the client, and that was also billed at that time. It was not a line and page entry.

First of all, we would have a paralegal do that. Second of all, the more complete entry is additional drafting of status report to client including cause of defenses and limitations with burden of proof. Those two tasks jointly account for the 2.3 hours.

THE COURT: Anyone else have anything for the good

of the cause?

MR. WHELAN: Your Honor, on behalf of Maersk, there has been reference by Mr. Keenan to the effect that there was overkill on research and preparation of pretrial materials.

My position and experience after this trial and going through this case is it was a challenging case because there were a lot of alternative possible theories of liability. If the Court didn't accept one, there's a possibility for the bailment, or it could be COGSA. And we found it to be at least at our firm challenging in that regard.

I submit, Your Honor, that it required substantial amounts of work on the legal side in terms of research and putting together the pretrial materials and the briefing.

I think Your Honor's memorandum of findings of fact, conclusions of law, which are 31 pages long, are evidence of this isn't a case that can be disposed of in a one line order or a two page opinion.

There are a substantial number of issues, both factual and legal. It was little more complicated than saying three containers were stolen from a facility, and we are going to apply a one decision on Pennsylvania bailment law. I think it was more complicated than what is being argued here today.

On another point, I know that in terms of -- there is in Mr. Keenan's letter to the Court reference to again these deposition summaries at page two and three on D, E and F.

I would submit that it has been my experience as a defense lawyer that when clients are paying us to defend cases, that they require deposition summaries. If you are spending six to eight hours at a deposition, they want to know why you spent that time, what happened, how does it impact the case.

A deposition summary -- because you are going to send a bill out, and they want to know where the case stands after you take meaningful discovery. And it is absolutely necessary -- at least from a defense counsel's point of view -- to summarize those deposition reports to your client, to advise them where the case stands and how it impacts the liability situation.

THE COURT: Mr. Keenan, what is your position again with the complaint against JVE Company?

MR. KEENAN: Your Honor, that it was overkill. The theory I guess for why they joined JVE was they were the landlord of the container yard. Kellaway has never taken the position that they didn't control and possess that property or that they weren't responsible for security. There was no need to join JVE.

They ultimately spent the money to prepare a complaint, serve it, bring it into the case and then voluntarily dismissed them.

THE COURT: Was there a deposition taken after that?

MR. KEENAN: I believe there was a deposition taken beforehand, Your Honor.

THE COURT: Before what?

MR. KEENAN: Before they dismissed them, Your Honor. There was a deposition, and then they dismissed the JVE. There was no reasonable purpose for bringing JVE into the case.

This wasn't a case where Kellaway said we didn't have that property; we weren't there. We didn't possess it. We didn't control it. We weren't responsible.

For security, Kellaway had always taken the position that the containers were under our control. Our defense was that we acted reasonably, and we weren't negligent.

I would just also add, Your Honor, there are some striking contrasts between the billing by Maersk and Mitsui. Their counsel are very comparable, experienced, and they are geographically in the same location. There really isn't any justification for some of the striking contrasts between the billing, Your Honor.

THE COURT: Well, ladies and gentlemen -- lady and gentlemen, I will take the matter under advisement. Thank you for your appearance for today.

MS. HIGGINS: Thank you.

MR. WHELAN: Thank you.

THE CLERK: Court is adjourned.

(Whereupon, the proceedings were concluded.)

I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me on the trial of the above cause, and that this copy is a correct transcript of the same.

Vicki L. Fox, RMR

Official Reporter

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